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IN THE

Supreme Court of the United States

October Term, 1958

No. 35

LLOYD BARENBLATT,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion and order of the Court of Appeals entered on January 16, 1958 (R. 291), upon remand by this Court, 354 U. S. 930, is reported at 252 F. 2d 129. The original opinion and order of the Court of Appeals dated January 3, 1957 (R. 271), from which petitioner petitioned for a writ of certiorari, is reported in 240 F. 2d 875. The District Court issued no opinion.

Jurisdiction

The opinion and judgment of the United States Court of Appeals was entered January 16, 1958 (R. 291). The peti-

tion for a writ of certiorari was granted on April 14, 1958 (R. 308). The jurisdiction of this Court rests on 28 U. S. C. 1254(1). See also Rule 37(b), F. R. Crim. P.

Constitutional and Statutory Provisions Involved

Constitution of the United States

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V. No person shall . . . be deprived of life, liberty, or property without due process of law . . .

2 U. S. C. Section 192, R. S. 102, 52 Stat. 942, as amended:

> Refusal of witness to testify.
>
> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828) and House Resolution 5 of the 83rd Congress read in relevant part:

(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

RULE XI

Power and Duties of Committees

(1) All proposed legislation, messages, petitions, memorials, and matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

17. Committee on Un-American Activities.

(a) Un-American Activities.

(b) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

Questions Presented

1. Whether all use of compulsory process by the House Committee on Un-American Activities is unauthorized, and also unconstitutional under the First and Fifth Amendments, because of the breadth and vagueness of Congress' purported grant of power to the Committee.

2. Whether Congress has authorized the House Committee on Un-American Activities to conduct by compulsory process an investigation in the field of education.

3. Whether compulsory process to force petitioner to answer the questions recited in the indictment should be deemed outside the House Committee's authority because such process violates the First Amendment.

4. Whether the House Committee adequately clarified for petitioner the subject of the investigation and the pertinence thereto of the questions recited in the indictment.

Statement

Petitioner, Lloyd Barenblatt, was convicted in the District Court for the District of Columbia under an indictment charging violation of 2 U. S. C., Section 192 for refusing to answer questions before a subcommittee of the House Committee on Un-American Activities (R. 67, 1). The indictment charged in substance that petitioner "unlawfully refused to answer" the following questions "pertinent to the question then under inquiry" before a subcommittee of the House Committee on Un-American Activities:

Count One: Are you now a member of the Communist Party?

Count Two: Have you ever been a member of the Communist Party?

Count Three: Now, you have said that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?

Count Four: Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?

Count Five: Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions? (R. 1-3).

Pursuant to subpoena, petitioner appeared and testified before the Subcommittee on June 28, 1954 (R. 35, 218). For a four year period immediately prior to his appearance, petitioner had been employed as an instructor in psychology at Vassar College. After he received the subpoena to appear before the Committee his contract with Vassar College expired and was not renewed (R. 239, 236). For the period of 1947-1950, prior to his association with Vassar College, he had been at the University of Michigan in the Graduate School of Studies, studying for his doctorate in social psychology (R. 219). During most of the period of his stay at the University he was a teaching fellow in psychology (R. 239).

The transcript of the Committee session at which petitioner appeared was published by the Committee as part of its series of hearings entitled "Communist Methods of Infiltration (Education)" (R. 173). At the commencement of that series on February 25, 1953, the chairman indicated that the purpose of the investigation was to examine the Communist Party's influence on the thinking of teachers and through them on students (R. 79); and that the Committee aimed to identify teachers who were "sub-

ject to the directives and discipline of the Communist Party" (R. 79) in the hope that, as in the case of Communists in official positions in labor unions, they would be eliminated from positions in the teaching profession (R. 77). In its Annual Report for 1953, issued prior to the subpoena to petitioner, the Committee reiterated that it was investigating the influence of "the Communist teacher" on the minds of students, in particular through "extra-curricular associations . . . in . . . Marxist study groups" (R. 243).

Petitioner was subpoenaed to appear and testify on June 28, 1954, on the basis of the fact that he was named by one Crowley. Crowley had previously refused to testify and had been cited for contempt. Crowley, however, had now decided "to come before the committee and tell his entire story" (R. 174). Crowley was the first witness to testify the morning of June 28. Immediately before he testified, the Chairman of the Committee asked the Committee counsel to explain the purposes "for this hearing this morning" (R. 174).

In answer the Committee counsel stated:

> "The field covered will be in the main communism in education and the experiences and background in the party of Francis X. T. Crowley. It will deal with activities in Michigan, Boston, and in some small degree, New York" (R. 175).[1]

Crowley then testified, among other things, that he knew petitioner when petitioner was a graduate student at the University of Michigan (R. 209). He further testified:

---

[1] In its 1954 Annual Report, the Committee stated with respect to the session at which petitioner testified: "The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success" (R. 262).

"Mr. Kunzig (Committee counsel): And you knew him to be a member of the Haldane Club in the Communist Party?

Mr. Crowley: Yes, just the Haldane Club.

Mr. Kunzig: The Haldane Club of the Communist Party, I should say.

Mr. Crowley: Yes, to my knowledge he left that and he left the University of Michigan.

Mr. Kunzig: Do you know where he teaches at the present time, if he teaches?

Mr. Crowley: Yes, he is at Vassar. I would like to say, in fairness to him—

Mr. Kunzig: Any testimony you can give, we would be glad to have.

Mr. Crowley: Yes, that he expressed to me his opinion that he was pretty much of the same opinion that I was about membership in the party. I am convinced that he has left it, the Communist Party.

Mr. Kunzig: Your close knowledge of him was up to about 1950?

Mr. Crowley: Yes, I have seen him a few times since then, occasional visits" (R. 210).

In respect to the Haldane Club, Mr. Crowley testified that it was a group for graduate students and teaching fellows (R. 203). In answer to the question "What sort of activities did the Haldane group engage in," he said:

"They were chiefly of an intellectual nature discussing things. It was mainly a discussion group. There was very little of the activity of the kind that Neafus engaged in, that is, running around the campus with petitions or things like that. . . .

Mr. Velde: Did you study Marxism?

Mr. Crowley: Yes, pamphlets on Marxism. I forget:

which ones, but the discussion centered around, as I recall, literature and cultures, on the subjects of arts, the relation to communism of Marxism, what is the function of the artist in that respect.

The Haldane Club was chiefly an intellectual group, discussion group.

Mr. Velde: That was only, as you testified before, about 8 or 10 members of the postgraduate group at the University of Michigan?

Mr. Crowley: Yes.

Mr. Velde: Do you have any idea how many postgraduates were in the University of Michigan at that time?

Mr. Crowley: The student body was about 20,000 altogether, and I think there must have been about at least 15,000 (sic) in the college, so I guess the graduate students would be 12,000 to 15,000, I think.[2] . . .

Mr. Velde: Do you feel that your colleagues had that idea, that they were engaged in a conspiracy?

Mr. Crowley: I am sure that the ones I know did not have that notion. They were people who were mostly the intellectual type of people who were getting their feet wet on something or other. Some of them may have had that in their mind, but I never heard it expressed in terms of overthrowing anything. It was never expressed to me that way" (R. 204, 215-216).

Petitioner was actually called to testify shortly before 4 P. M. and was the last witness that day (R. 241, 36). The Subcommittee made no statement to petitioner as to the purpose of interrogating him (See R. 218-241).

Petitioner, in response to the questions upon which the indictment rests, attempted to present orally a written

[2] "15,000 in the college" apparently was a misprint for "5000."

statement of objections in explanation of his refusals to answer (R. 220-227, 235-238). His objections stated that he had no governmental employment (R. 227); he reasoned that it was therefore beyond the constitutional power of the Committee to investigate his political beliefs and associations; and he noted, quoting an opinion of this Court, that "'the citizen . . . has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer'" (R. 229).

The Subcommittee refused to hear these objections and indicated that it was only concerned with whether he was asserting his privilege against self-incrimination (R. 227, 235-238, 240).

Proceedings Below

Petitioner's motion to dismiss the indictment for insufficiency was denied (R. 3-8). After trial by the Court defendant was adjudged guilty and sentenced to imprisonment for a period of six months and fined $250 (R. 67).

A panel of the Court of Appeals upheld the conviction in an opinion and order dated January 3, 1957. It held that even if one of the Committee's purposes in summoning petitioner was to expose his identity to the people of Michigan, its dominant purpose had been to acquire information relevant to "communist infiltration in the field of education" (R. 279-280). Such an investigation was, the Court held, within the Committee's authority. The Court further reasoned that this investigation might be justified, from the standpoint of a legislative purpose, by Congressional concern with educational stipends for veterans and governmental grants for research to colleges and universities (R. 282). Finally the Court reaffirmed a previous holding that Congress can inquire "'into threats to the existing

form of government by extra-constitutional processes of change. . . .'" (R. 284). For these reasons, the opinion concluded, the Committee could investigate "the Haldane Club of the Communist Party, to which appellant allegedly belonged" and "the identity of its members and the extent and nature of their participation," even if it were "principally a Marxist study group" and an "intellectual discussion group(s)" (R. 284).

A petition for certiorari was duly filed in the Supreme Court and on June 24, 1957, a *per curiam* order was entered, vacating the judgment of January 3 and remanding the case "for consideration in the light of *Watkins* v. *United States*, No. 261, October Term, 1956, decided June 17, 1957" (R. 290).

Upon remand the Court of Appeals, *en banc*, by a 5-4 court division entered its opinion and order of January 16, 1958, sustaining the conviction. It recognized that this Court had in *Watkins*[3] "in no uncertain terms criticized the resolution creating the Committee for lack of specificity, for uncertainty, for vagueness, and the scope of the construction accorded to the resolution as acted upon by the members of the Committee and its Subcommittees" (R. 293). It held, however, that this Court had not in *Watkins* intended to strike down the resolution.

Further considering *Watkins*, the Court of Appeals believed that this Court was there "of the opinion that the vagueness of the resolution made it necessary, and only fair, that the witness be apprised of the particular matter under inquiry by the Committee or Subcommittee holding the hearings, and, on objection, of the pertinency of the questions involved in the inquiry" (R. 295). The Court below concluded, however, that petitioner had not objected

[3] 354 U. S. 178.

to the questions on grounds of pertinence (R. 279, 302) and that in any event the subject of the investigation, "Communist Party activities within the field of education," and the pertinence thereto of the questions were clear to him (R. 302). The Court of Appeals also held that this Court's decision in *Sweezy* v. *New Hampshire*, 354 U. S. 234, did not compel it to rule that any of petitioner's constitutional rights were violated (R. 296).

Chief Judge Edgerton in a dissenting opinion joined by Judge Bazelon stated: "I understand *Watkins* to hold that the Committee on Un-American Activities had no authority to compel testimony because it had no definite assignment from Congress (R. 304). He then expressed the opinion that "'even if, contrary to my clear understanding of *Watkins*, Congress did 'with sufficient particularity' authorize the Committee to investigate something," its power to investigate "'un-American propaganda activities' need not and therefore should not be interpreted to authorize the Committee to select for investigation political activities and connections of university teachers" (R. 305-306). Circuit Judge Fahy in a separate dissenting opinion joined by Circuit Judge Washington stated: "Reading *Sweezy* in the light of *Rumely* and *Watkins*, I think the Committee could not proceed to investigate the field of education—at least with the use of compulsory process, under the sanction of contempt—without a more specific authorization than it had been given, and that therefore, the conviction must be reversed" (R. 306-307).

Summary of Argument

The opinions in the Court below, expressing different interpretations of this Court's decisions in *Watkins* and *Sweezy*, present two questions concerning the meaning to be found in the Committee's mandate from Congress. We

consider these two questions as the first two points in our Argument. The third point of our Argument: whether compulsion to answer the questions recited in the indictment violated the First Amendment—had been considered in the original opinion of the Court below and was not reconsidered on remand. As we shall indicate, however, we believe the *Watkins* and *Sweezy* opinions threw new light on this question, and it has been further illuminated by this Court's opinions since the reconsideration below. The fourth point of our Argument, relating to pertinence, was only considered by the majority in the Court below.

Some or all of these questions are involved in a number of cases pending in the Federal District Courts and Courts of Appeals, awaiting the decision of this case. The pending cases involve refusals to testify on grounds of the First Amendment in investigations in various fields before the instant House Committee or before the Internal Security Subcommittee of the Senate Judiciary Committee, which conducts investigations of a similar type to those of this Committee. In some of the proceedings the witness refused to answer all questions pertaining to belief, expression of opinion, and association for the purpose of such expression; in others, he answered all questions except those directed at the disclosure of the names of others with whom he had been associated for that purpose (as to the latter type of First Amendment case, see *infra* note pp. 40-41).

I.

On the basis of this Court's opinion in *Watkins*, it is clear that the language of the legislation purportedly granting investigative authority to the House Committee was not sufficiently definite and specific to constitute a delegation of power, and thus there is a complete lack of authority in the Committee to investigate by compulsory process. Peti-

tioner's summons was not therefore issued by authority of a Congressional committee within the meaning of the statute punishing contempt (2 U. S. C. § 192). Furthermore, because the uncertainty as to the Congressional intent means that the Committee has no operative authorization to conduct any investigation, any use by it of compulsory process is, under *Sweezy* as well as *Watkins*, a violation of due process.

Finally, the vagueness of the legislation is a particular vice because the purported authorization lies in the First Amendment field. The language of the resolution and statute pertaining to the Committee, both on its face and as interpreted over the years by the Committee, gives it virtually unlimited power to require witnesses to submit to public interrogation on matters of political belief and expression. The pervasive threat inherent in the Committee's free-wheeling power to compel testimony casts a restraint over free expression on all public issues and inhibits the expression of all non-conformist political thought. To guard essential freedoms from such a blanket repression, legislation delegating coercive investigative authority, like all other legislation in the First Amendment field, must be narrowly drafted, specific and definite. Use of compulsory process by the Committee, under this vague and sweeping legislation, therefore violates the First Amendment.

II.

An investigation of belief, expression, and association in the academic world concerns a field in which freedom from Government intrusion is of special importance under the First Amendment. It is possible to interpret the Committee's authority so as to avoid the Constitutional question presented by an investigation in this field, and by the instant investigation in particular. For, it is "propaganda"

which the legislation purportedly empowers the Committee to investigate, and this term is not generally understood to include the communication of ideas in colleges and universities.

III.

An investigation that imposes restraints on First Amendment rights is constitutional only if the restraints are justified by a compelling public need.

A. As to the first side of this equation—the restraints—here restraints on First Amendment rights were inevitable from the very purpose of the investigation. For the investigation as a whole, including as an integral part the summoning and interrogation of petitioner, was directed at the area of belief, expression of opinion, and association for the purpose of such expression—an area far removed from unlawful action or its incitement. Petitioner himself was subpoenaed to testify on the basis of information that he was a member of a group engaged in academic discussion of Marxist principles, particularly in relation to culture and art. At the outset of the investigation the Committee chairman had stated that the Committee's concern was with the Communist Party's influence on the thinking of teachers and through them on that of students; and the Committee report issued in the course of the investigation but prior to the summons to petitioner corroborated the fact that the focus of its investigation was belief, discussion, and peaceful political persuasion. The hearings demonstrate this dominant purpose throughout, as well as the Committee's great reach into the domain of belief and the inferable scope of its interrogation of petitioner if he had obeyed the command to answer.

The two phases of Communist activity to which the interrogation of witnesses was directed, were the purely

intellectual—that is, discussion in a study group of Marxist theories and public issues—and efforts at public persuasion on such issues, by oral or written expression either in other organizations or to the general public. But the Communist Party habitually takes positions which are not peculiarly or distinctively Communist on current public issues. The same conclusions on public affairs generally can be arrived at from non-Communist premises, and are often held by non-Communist but non-conformist thinkers. Thus, the investigation of the thinking of the witnesses on public issues and of their efforts to promote their views in other organizations, necessarily meant that the Committee examined and passed judgment on viewpoints on public issues held by non-Communists and debated in the community as a whole. The sharpness of the Committee's inquisition into the witnesses' political viewpoints seemed linked with its avowed purpose of judging whether those who admitted past Communist membership or sympathy were any longer under influence of Communist thought.

A related and salient point in the interrogations was the Committee command that witnesses name persons with whom they had associated for the discussion and expression of their views—a command apparently regarded as crucial in testing whether the witness was entirely cleared of Communist influence. Because the investigation was directed at the area of belief and opinion rather than the area of unlawful acts or their incitement, witnesses were placed in a unique ethical and legal situation: they were ordered to subject past friends and associates to a damaging exposure though neither the witness nor the Committee had any basis for believing that the persons whose names it demanded had ever been involved in unlawful activity or could contribute an iota of information about it.

In view of the factors we have outlined—the purpose of investigating the thinking of private citizens, the examination and evaluation of viewpoints in general currency on public issues, and the probe into lawful political association—the investigation imposed sweeping and severe restraints on First Amendment rights. As pointed out in *Watkins* and *Sweezy*, such an investigation coerces an adherence to orthodox and conformist views not only on the part of the witnesses, but the general public as well. Here the inhibiting effect would be especially felt in the academic community where freedom of thought and expression from government interference is extraordinarily important. Further, the Committee imposed a particular restraint on freedom of association; an inhibition on all non-conformist association resulted from the compelled public exposure of past associations for the expression of opinion and their appraisal by present standards. The Committee's insistence on the witness' subjecting past friends and associates to the same type of damaging Committee exposure he was himself undergoing, although there was no indication they had done anything other than express peaceful political opinion and participate in normal political activity, augmented the restraint on freedom of political association. This demand that the witness visit harm on his past associates, when the only purpose appeared to be to win his own exculpation rather than to serve any public need, also interfered with freedom of conscience, for the Committee thus used Government power to try to impose a standard as to right conduct that is contrary to widely and deeply held ethical belief.

These restraints and interferences flowed from the underlying condition that the basic purpose of the interrogation of petitioner and of the entire investigation was diametrically contrary to First Amendment principles. The Committee's articulate premise was that an influence upon the

thought of private citizens which may lead them to erroneous conclusions is the proper concern of Congress and is to be eliminated no matter how minor it may be in comparison to other influences. The Committee thus contradicts the underlying theories of the First Amendment that "It is not the function of our Government to keep the citizen from falling into error," and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." By attempting to degrade teachers in their standing and bar them from their profession on the basis of their alleged beliefs and associations, in order to impede their effective expression of their views and their access to an audience, the Committee also violated a corollary First Amendment principle: that the Government cannot interfere with speech on the basis of the character or associations of the speaker, but can only be concerned with whether specific utterances transcend Constitutional limits. The fact that the Committee must secure private cooperation in order actually to deprive teachers and others in opinion-expressing vocations, of their employment and their opportunities to reach an audience, does not relieve the Committee of responsibility for initiating their deprivation and for its interference with their right under the First Amendment to address any willing audience, regardless of their beliefs and associations.

B. It may be unnecessary in the case of the instant investigation to consider the second side of the constitutional equation: whether there was any legislative purpose that might have afforded justification for the restraints the investigation imposed on First Amendment rights. For, the validity of the investigation must be judged by its then purpose. Here the purpose—to investigate the thinking of private citizens and associations affecting it—placed the investigation squarely in the domain of belief. This is an

area to which the First Amendment gives absolute protection from Government intrusion and which by definition is far removed from action, the area of legitimate Congressional concern. There could therefore be no legislative justification for an investigation in this area.

Assuming *arguendo* however, that possible justifications for the instant invasion of rights should be considered, it is clear that the interrogation of petitioner had as its sole purpose "to expose for the sake of exposure," and that it therefore did not serve a permissible legislative purpose. Besides the Committee's statement to this effect with respect to the particular section of the investigation which included petitioner, the announced purpose at the inception of the entire investigation was to deal with "infiltration of education" by public exposure of members of the teaching profession who were connected with the Communist Party.

Again making an *arguendo* assumption—here, that the interrogation of petitioner should be viewed in the light of legislative purposes the Committee might have had in conducting the investigation—we shall consider the view of the court below that the investigation found ultimate justification in Congressional concern with efforts to overthrow the government by force and violence. The Committee's statements and the hearings themselves indicate that it at no time thought it likely or had reason to believe that the instant investigation into opinion and normal political activity would produce information as to such efforts or any incitement and advocacy of unlawful action; in particular there was no reason for such belief with respect to the interrogation of petitioner, who was summoned because of alleged membership in a group that discussed Marxist theory in relation to the arts. The beliefs and expression of opinion here under investigation were a number of "re-

moves" and extremely remote from expression so proximate to action that it is within legitimate Congressional concern under the Constitution. Even if such a tangential connection between an investigation and a legislative concern might ordinarily suffice, there must be compelling reason for an investigation which, like the instant one, seriously interferes with First Amendment rights. More must be shown to justify this investigation than the highly remote connection—which is the most respondent can show—between it and efforts to overthrow the government.

The Court below also suggested, as possible justifications for the investigation, Congressional concern with educational grants to veterans and with defense research grants to universities. The investigation was not, however, directed at either of these subjects, and it must be justified by its then purpose rather than retroactive rationalizations. Furthermore, the matter under investigation was extremely remote from any concern which Congress could constitutionally have with grants to veterans, and equally or even more remote from the problem of defense research grants. Such a remote and speculative connection with a matter of legislative concern cannot justify an investigation intruding on First Amendment rights.

IV.

The conclusion of the Court below that the Committee clarified for petitioner the subject of the hearing and the pertinence thereto of his interrogation, rests on the assumption that petitioner listened to the session at which he was interrogated from its opening. It seems doubtful that a Committee should be held to have discharged the duty of clarification required by *Watkins*, on the basis of such an assumption; but even if the Court was correct in this respect, it erred in its conclusion.

ARGUMENT

I.

The Committee's use of compulsory process was unauthorized, and also unconstitutional under the First and Fifth Amendments, because of the vagueness and breadth of Congress' purported grant of power to the Committee.

As stated in Chief Judge Edgerton's dissenting opinion in the Court below, this Court ruled in *Watkins* on the instant committee that the "'responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose . . . requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity . . . No witness can be compelled to make disclosures on matters outside that area' (the area assigned the Committee by Congress) . . . Since Congress did not define that area, there can be no proof the Committee's questions were within it" (R. 304-305). Thus, this Court's finding in *Watkins* that the Committee's charter is highly indefinite and "excessively broad" (354 U. S. at pp. 202, 204, 205), dictates the conclusion that it did not constitute a delegation of power to investigate by compulsory process. Petitioner was not therefore summoned by authority of Congress or a Congressional committee within the meaning of the statute punishing contempt (2 U. S. C. 192), and his conviction falls for lack of authority and jurisdiction of the Committee to use compulsory process, even without the invocation of his constitutional rights.

Moreover, because of the vagueness of the Committee's mandate, it is also clear that the use of compulsory process and the contempt conviction based thereon violate petitioner's constitutional rights. Under due process of law

no one can be required to respond to governmental authority delegated in language as vague and meaningless as that of the House resolution and the statute. This conclusion follows from *Sweezy* as well as *Watkins*. The mandate to the Committee is so sweeping and indefinite, that there can be no certainty any subject of investigation is one on which Congress actually desires information. This situation is the equivalent of an absence of authority for any investigation. An infringement of privacy by a compulsion to make disclosures—even apart from the infringement here of First Amendment rights because the disclosures demanded by this Committee relate to belief and expression of opinion (see *infra*)—violates due process of law in the absence of Congressional authorization to the Committee to obtain the disclosures. *Sweezy*, 354 U. S. at pp. 253-255.

Violation of First Amendment

In addition, in *Watkins* this Court pointed out, as it often had before, the particular necessity for definiteness in a grant of authority when the authority lies in the field of First Amendment rights.[4] There is no question that the authorizing resolution and statute establish the Committee as an investigatory power in the First Amendment area. On its face, the dominant intent of the legislation is to authorize the investigation of peaceful expression of political opinion—the very type of expression which the Amendment is intended to protect above any other because of its essentiality to the democratic form of government.[5] For "propaganda" is merely a loose and opprobrious term for opinions expressed in an effort to persuade; "un-American"

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[4] *Watkins*, 354 U. S. at p. 198. See *Winters* v. *New York*, 333 U. S. 507, 509-510, 517; also *Burstyn* v. *Wilson*, 343 U. S. 495, 504; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-99. Cf. *Speiser* v. *Randall*, 2 L ed 2d 1460, 1473, as to the particular necessity for procedural protection "when the transcendent value of speech is involved."

[5] See *Stromberg* v. *California*, 283 U. S. 359, 369; *Winters*, 333 U. S. at p. 518.

must refer to opinion that seems in some vague way undesirable; "subversive" is "flexible; it will mean one thing to one officer, another to someone else";[6] and propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution," certainly covers a broad area of political expression, rather than merely speech which advocates and incites unlawful action and may therefore fall outside the area protected by the First Amendment.[7]

Not only is the Committee thus authorized to investigate peaceful political expression, but it is empowered to and necessarily must, in the performance of its duties, define and classify political opinion in terms of whether it is "un-American," "subversive," or "attacks the principle etc." —that is, it must arrogate to the government the function of stamping political opinion as orthodox or heretical. The statute and resolution on their face thus authorize the grossest and most dangerous interference with First Amendment freedom. *Board of Education* v. *Barnette*, 319 U. S. 624, 640-642; *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5.

Furthermore, as this Court pointed out in *Watkins*, the terms of the Committee's authorization must now be read in the light of their application over the years by the Commitee (354 U. S. at pp. 202-203). So read the authority embraces the investigation of every expression of opinion, whether oral or written, that coincides with the Communist view on any subject or that may reflect sympathy with the Communist Party or Soviet Russia, and any organization or individual engaging in such expression or in association

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[6] *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 176 (Douglas, *J.* concurring). And see p. 194 (Reed, *J.* dissenting): "subversive" takes meaning from accompanying terms.

[7] See *Dennis* v. *United States*, 341 U. S. 494, 502, 515, 516; compare *Yates* v. *United States*, 354 U. S. 298, 318-321; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 279 (Reed, *J.*, dissenting); *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 395.

with such organizations or individuals.[8] In practical terms, this means the power to investigate any group or individual espousing a non-conformist political view. There is, and has been no limitations in the Committee's investigations in terms of advocacy of unlawful action.[9] In short, the Committee has totally ignored the distinction between expression which must be allowed freedom under the First Amendment and that which may be restrained (See cases cited note 7).

Thus it is clear that the Committee's grant of authority, as written and as interpreted over the years, gives it virtually unlimited power to summon witnesses and compel public disclosure on matters of thought and expression. Like the ordinance recently considered in the *Staub* case, this power "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official";[10] and like the ordinance the authorization is invalid on its face. Here as there the existence of the power casts an unconstitutional prior restraint on expression. For while this Committee's investigatory power exists, the only safety lies in abstention from political expression or in its near-equivalent from the standpoint of a free mind, unquestioning conformity.

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[8] See *Watkins*, 354 U. S. at note 40, pp. 202-203, and *Barsky* v. *United States*, as there cited; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 (1946) Harv. Law. Rev. 1193.

[9] In the interim since the *Watkins* decision, the Committee has continued without abatement to exercise its sweeping power to investigate non-conformist expression it deems "un-American." During the past year it has stressed its view that efforts to obtain legislation to amend existing harsh immigration laws and to abolish the Committee are a threat to security and Communist-inspired. See Annual Report for 1957 of House Committee on Un-American Activities, 85th Cong. 2d Sess., House Report No. 1360, esp. p. 14; and pp. 13, 6-7, 9. As to the severity of the immigration laws, see *Rowoldt* v. *Perfetto*, 355 U. S. 115, 121.

[10] *Staub* v. *Baxley*, 355 U. S. 313, 322.

This is true because non-conforming opinion or association may invite, even long after the event, embarrassing exposure by the Committee in the "glare of publicity . . . , scorn and obloquy," loss of status and of position (*Watkins*, at p. 197, and *infra* p. 48 at note 39). As a result, the Committee exerts a restraint not only upon those called before it, but it also has a "subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and association."[11] Thus, through its power to force individuals to undergo a public political inquisition, the Committee coerces an acceptance of its standards of politically acceptable thought. As in the case of broad measures imposing more orthodox types of punishment or censorship of expression, the overall threat inherent in the Committee's power casts a restraint over the whole field of peaceful political expression and association. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion" and exerts a "continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98. The Committee's vague and all-inclusive power in the First Amendment field "blankets with uncertainty" as to the consequences, and thus inhibits free expression on all social, economic, and political issues.[12]

In sum, to preserve the fullest possible protection for the essential freedoms of thought, expression, and association, legislation granting investigative power, like all other legislation affecting First Amendment rights, must be definite,

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[11] *Watkins*, at pp. 197-198. See also *Sweezy* at p. 248; *Barsky* v. *United States*, 167 F. 2d 241, 255 (C. A. D. C.) (dissent).

[12] *Thomas* v. *Collins*, 323 U. S. 516, 535; compare *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191.

specific, and "narrowly drawn to meet the supposed evil." [13] Thus, under the First as well as the Fifth Amendment, the purported grant of authority to the Committee to conduct investigations by compulsory process is unconstitutional because of its breadth and vagueness.

II.

Congress did not authorize the Committee to conduct by compulsory process an investigation in the field of education.

We respectfully refer this Court to the two dissenting opinions in the Court below, in which four judges held that the Committee was not authorized to investigate in the field of education (R. 305-7).

The articulate purpose of the Committee in conducting this investigation in the field of education was to determine the influence of the Communist Party upon the thought of members of the teaching profession and their influence in turn upon the thinking of their students (*supra*, p. 5). In any event, whatever the precise formulation of committee purpose, an investigation by this opinion-investigating committee in the field of education would necessarily infringe on the expression and exchange of ideas in the academic world. Accordingly, the Committee's authority should, if possible, be construed to exclude this field of investigation. For, as the dissenting Chief Judge in the Court below pointed out:

> "Four Justices of the Supreme Court recently said: 'It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon

[13] *Cantwell* v. *Connecticut*, 310 U. S. 296, 307.

> such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community. . . . [T]he areas of academic freedom and political expression' are 'areas in which government should be extremely reticent to tread.' Two other Justices said in the same case: 'These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university.' *Sweezy* v. *New Hampshire*, 354 U. S. 234, 245, 250, 262" (R. 305).

Considering that an investigation of education thus involves an area of particular significance under the First Amendment and one that is far removed from the legislative sphere allowable to the Federal government under the First Amendment (see *infra*, pp. 50, 52-56), it can hardly be assumed Congress intended the Committee to invade this field. "[W]e should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Yates* v. *United States*, 354 U. S. 298, 319. Indeed, the Committee's authorization would be unconstitutional if construed to include the instant investigation (see *infra*, Point III). It is possible, however, to interpret the grant of power to the Committee to avoid this Constitutional problem. The authorizing resolution and statute speak of investigations of "propaganda"; the communication of thought and opinion at educational institutions is not propaganda as the term is generally understood and it need not be read here in other than its common meaning.

We do not mean to indicate there is any First Amendment restriction on summoning a teacher as a witness in a valid investigation. Of course, there is no special immunity for teachers. Our argument is that the investigation was

unauthorized because its subject was education—specifically, influences on thought and the individuals who might exert allegedly undesirable influence on thought at educational institutions. Our view is that it would be invalid to force any witness to testify in an investigation on this subject, whether or not the witness was himself a teacher.

III.

The Committee's authority as here applied, to force petitioner to answer the questions recited in the indictment, violates the First Amendment.

It is now established beyond argument "that an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly" (*Watkins*, 354 U. S. at p. 197); that the impact of a Congressional investigation as a restraint and coercion on First Amendment rights must therefore be judicially assayed; and that a committee interrogation is constitutional only if the restraint it imposes on First Amendment rights is justified in terms of its connection with a compelling legislative objective (*Watkins*, at pp. 198-199, 205-206; *Sweezy*, 354 U. S. at p. 251; and pp. 261, 265, Frankfurter, *J.*, concurring). This doctrine is supported by a wealth of precedent, establishing that a government command to the individual to give an accounting and submit to an inquisition is a substantial governmental interference with individual privacy, independence, and enjoyment of the freedoms guaranteed in the Constitution.[14] In its most recent opinion on

[14] See *Rumely* v. *United States*, 345 U. S. 41, 44, 48, affirming 197 F. 2d 166 (C. A. D. C.) (see especially 197 F. 2d at p. 174); *United States* v. *Harriss*, 347 U. S. 612, 625; *Schneider* v. *State*, 308 U. S. 147, 164; *Thomas* v. *Collins*, 323 U. S. 516; *Electric Bond and Share Co.* v. *Securities and Exchange Comm.*, 303 U. S. 419, 441. As to government subjection of an individual to public scorn and obloquy, see *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 139, 159, 161, 186; cf. *Brown* v. *Board of Education*, 347 U. S. 483, 494.

this question, this Court said, addressing itself to freedom of association:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . (an) effective . . . restraint on freedom of association. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *National Association for the Advancement of Colored People* v. *Alabama*, 2 L ed 2d 1488, 1499-1500.

Reviewing the justification there alleged for the compelled disclosure, the Court thereupon held that the State "had fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have" (2 L ed 2d, at p. 1502).

Accordingly, we shall first consider (section A) the restraints imposed on First Amendment rights by compulsory process to compel a response to the questions petitioner refused to answer, and then consider (section B) whether there was any justification for the interrogation in terms of a legislative objective.

A. Compulsion to Answer the Questions Recited in the Indictment Would Impose a Severe and Sweeping Restraint on First Amendment Rights

Petitioner was summoned and questioned by the Committee on the basis of its information that he had allegedly been a member of "The Haldane Club" of the Communist Party while a graduate student and teaching fellow at the University of Michigan in 1949-50. The Haldane Club, the Committee had been informed, was an "intellectual group,

discussion group" of 8 or 10 graduate students, out of some thousands of graduate students at the University.[15] According to the informing witness, Crowley, who had been an undergraduate student at the University at the time, "the discussion centered around, as I recall, literature and cultures, on the subjects of arts, the relation to communism of Marxism, what is the function of the artist in that respect. The Haldane Club was chiefly an intellectual group, discussion group . . . They were people who were mostly the intellectual type of people who were getting their feet wet on something or other" (*supra*, p. 8).

It is apparent from this testimony that the Committee, in summoning petitioner, was investigating belief and discussion, far removed from unlawful action or its incitement, instigation or preparation. The Committee's purpose and focus in the interrogation of petitioner—a primary determinant of its impact on First Amendment rights—is further illumined by the purpose and focus of the investigation in which he was called. For this reason, and also because the pattern of the investigation shows the likely reach of the interrogation of petitioner if he had obeyed the command to answer, as well as the effect of such an interrogation on First Amendment rights, we shall describe the larger context of the summons to petitioner: the investigation into "Communist Methods of Infiltration (Education)."

1. *Purpose, Focus, and Scope of the Committee's Investigation of "Communist Methods of Infiltration (Education)"*

a. Committee's Articulated Purpose and Focus

At the commencement in 1953 of the investigation in which petitioner was called, the Committee chairman (Mr. Velde) indicated that a particular concern of the Committee

[15] *Supra*, pp. 7-8.

was "the type of 'thought control' practiced by the Co
munist Party upon its members" and "the opportunit
that the Communist Party has to wield its influence up
members of the teaching profession and students throu
Communists who are members of the teaching professio
(R. 79).

In its Annual Report for 1953, published Feb. 6, 19
in the course of the investigation and before the interro
tion of petitioner in June 1954, the Committee emphasiz
and dilated on the point that its investigative focus was
influence of teachers in higher education upon the min
of students, particularly through extra-curricular assoc
tion in "Marxist study groups," though, as it stated "T
Communists in the teaching profession have been so f
. . . ." (R. 243). Quoting the testimony of its leading w
nesses, Davis and Boorstin, the Committee Report mak
crystal clear that the phase of the Communist Party wh
it was continuing to investigate was thought, discussi
and expression on social, political, and economic issu
rather than preparation, instigation, or incitement of
lawful activity. Thus, the Committee highlights Dav
testimony that he had joined the Communist Party becau
he had seen merit in the Marxist explanation of the e
nomic depression, and because he had been concerned w
the advance of Hitlerism in Europe, against which
Communist Party had been organizing a broad united fr
(R. 244). The Committee also stresses, as the fruit of
investigation, Davis' disclosure of his work in the Co
munist Party of attempting to persuade the Teache
Union to take the positions held by the Communist Pa
on "public questions" (R. 245); and, again demonstrati
its focus on the intellectual aspect of Communist Pa
membership, the Report quotes Davis' present day vi
that Communists should not teach in American universit

because he thought they were "'dishonest in what they say, whereas Aristotle and Plato were honest'" (R. 246).

Confirming the purpose and course of the investigation, the Committee reports the witness Boorstin's prior membership in a Marxist study group while a Rhodes Scholar at Oxford, and that the Communist Party's appeal to him rested on its stand against Nazism and on the inclusion in the Communist Party group at Harvard (consisting of 3 to 15 persons throughout the University, R. 83) of Granville Hicks and some friends who lent interest to the discussions of Marxism (R. 246-247).[16]

Thus, there is no mistaking the purpose and focus of the investigation. Not merely the opening statement of the Chairman of the Committee, but to an even greater extent its official report, demonstrates that the dominant purpose of the investigation was to probe matters of intellect and political belief rather than any unlawful acts. We shall now consider the hearings themselves; they further demonstrate this dominant purpose, and also show the great reach and range of the investigation into the domain of belief.[17]

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[16] Hicks, also mentioned in the Report as an important witness, corroborated Davis' testimony (R. 157). It is interesting to compare the Committee's discussion of Hicks' testimony (R. 248) with his actual testimony as to his first-hand experiences as a writer (R. 166-167).

[17] Excerpts from Parts 1 and 9 of the series of hearings in which petitioner testified, have been included in the record in the instant case (R. 75, 173). The entire hearings, that is, the Hearings of the House Un-American Activities Committee, 83rd Cong. 1st and 2nd Sess., entitled "Communist Methods of Infiltration (Education)" can of course be judicially noticed, and petitioner has filed a complete set of the hearings with the Clerk of this Court. They will be referred to herein as Hearings or abbreviated Hg.

b. Investigation into Political Belief, Persuasion, and Association

(1) *Group Discussion of Philosophy and Theory*

Davis' testimony, which the government states in its brief in opposition to certiorari (p. 6) is illustrative of the scope of the investigation, and which indeed laid down the general lines along which succeeding witnesses were questioned, established that there were two forms of Communist activity involved in the investigation. One was purely intellectual—it was typified by group discussion and debate on various Marxist theories or issues of the day (Davis: Hearings, 28, 32), the group generally consisting of 4 to 10 professors, professional staff members, or graduate students at the particular university. These discussion sessions, highlighted in the Committee Report as "Marxist study groups" (*supra*, p. 30), were described by all the witnesses who testified about them along the following lines:

> "There was no compulsion for the individual to attend or to have regular attendance because it was a group which discussed the Marxian philosophy and attempted to apply what they could from the discussion to the present day, that is, present day of that time . . . we read individual books. We would take chapters for example in Karl Marx' book or in Engels' work for example, and I remember clearly, since I was very much interested in it, the Dialectics of Nature. Each one would have a turn and he would lead the discussion within the group and there would be argument and debate . . . for example I remember clearly a great dissension within the group on the nature of the value of objects . . . we all were interested in it and we were drawn into it because of our interest, the Marxian philosophy. We believed in its application . . . We accepted the theoretical side, with argument and de-

bate . . . The Capital is very hard to understand. On the other hand, Dialectics of Nature I frankly and honestly enjoyed much more than I did the other . . . I had read the Communist Manifesto before then. We did not study that because I don't think we were basically interested in that. That was sort of, as you know, like an order or direction. This was an intellectual group which liked to argue and discuss . . . For example, during the early part of the war when the Soviet Union called the war a war of national liberation . . . we studied books on the problem of national liberation. We read up on it as to what they meant by national liberation. At other times . . . we studied very carefully the genetics controversy. . . . " (Dr. Marcus Singer, now Professor of Zoology at Cornell University, as to the Harvard group when he taught there: Hearings, 1539-41).

See also Hg. 52-54, 1029-1031, 1047-1054, 1922, 1924-1926.

(2) *Opinion, and Efforts to Persuade the Public, on Controversial Public Issues*

Besides the purely intellectual and philosophical aspect, the other aspect of Communist Party activity under investigation was political opinion and persuasion on current public issues. The Communist Party members tried to persuade their colleagues (Hg. 14, 16),[18] organizations (Hg. 20-25, 54-55), or the public at large (Hg. 26-27) to adopt and support their views on public issues, sometimes through writing pamphlets or articles, such as Davis' on anti-

[18] Generally, the professors not only made no attempt to influence the students politically in class, but also had no political contact with them outside of class, except to the extent that professors might address public meetings attended by students. Student and faculty discussion groups were generally entirely separate (Hg. 14, 16, 1023, 1868, 1925).

Semitism and Nazism (Hg. 33-34); they also contributed and tried to get contributions to the current public causes in which they were interested (Hg. 35, 1559, 1920).

In investigating the political opinion and persuasion phase of the Communist Party, the Committee's interrogation of witnesses was necessarily directed at exposing and evaluating viewpoints in general public currency on the social, economic, and political issues in debate in the community as a whole. For, it is a matter of common knowledge, and amply evidenced by the Committee report and the testimony of the leading witnesses (*supra*, pp. 30-31), that the Communist Party habitually takes positions which are not peculiarly or distinctively Communist on current public questions.[19] The same conclusions on public affairs generally can be arrived at from non-Communist premises, and are often held by non-Communist "liberals." Thus, in examining the thinking, expression, and efforts at persuasion of Communists or alleged Communists on public issues, the Committee necessarily examined and passed judgment—always implicitly and sometimes explicitly—on viewpoints held by non-Communists as well as Communists. Here the Committee was not dealing with Marxist theory or any parochial, abstract, or philosophical issue, but was instead involved in and endorsing viewpoints on everyday political issues. These controversial public issues were a salient phase of the investigation into both the thinking of the witnesses and their efforts to promote their views in other organizations.

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[19] Davis and other witnesses indicated that they joined the Communist Party though its position was not distinctive on the issues of concern to them—unemployment, discrimination, anti-Fascism, peace—because they felt that it was working militantly, particularly through its members' efforts to educate other organizations, to mobilize mass public opinion on these issues (See Hg. 5, 9-10, 57, 1029, 1047, 1544, 1846-1847, 1918).

Thus, Davis testified that he and the half-dozen or so other Communists on the Harvard staff in the 1930's (Hg. 6) were attempting to promote "policies desired by the Communist Party" in the Teachers' Union (Hg. 9). This testimony was stressed by the respondent in its brief in opposition to certiorari (pp. 6-7), but respondent neglected to mention what these policies concerned. Davis testified that the policies and resolutions the Communists would have tried to persuade the Teachers' Union to adopt "would have had to do again with the national political situation at that time. The Communists supported the New Deal, supported the Roosevelt administration until the Russian pact of 1939; . . . measures . . . against anti-Semitism; against fascism; for minority rights" (Hg. 11).

Accordingly, because the Committee was investigating the field of opinion and persuasion on public issues, it asked witnesses to explain and defend their views and public expressions on such controversial issues as the Spanish embargo (Hg. 74); the deportation of Harry Bridges (Hg. 74); the sentence imposed on Earl Browder and the appeals for clemency for him (Hg. 79-81, 1078-9); opposition to the immigration law co-authored by one of the Committee members (Hg. 85); the cause of the Korean War (Hg. 93, 5781); support of "liberal" legislation (Hg. 1030); opposition to the Committee (Hg. 1088, 1097); and the desirability of allowing Communists to teach (Hg. 1055, 1087-1088, 1138, 1557-8, 1580).

Sharp inquisition into the viewpoints of witnesses on such public issues was necessary in view of the Committee's aim of determining whether those who admitted past Communist membership or sympathy were any longer under the intellectual influence of the Communist Party. An important function assumed by the Committee in this investi-

gation was to determine whether the witness had been redeemed intellectually and should be considered "cleared" of Communist influence on his views.[20] In line with this purpose, interrogation was directed at whether the witness, confessing past mistakes, had adopted views acceptable to the Committee on past political issues as well as on more recent events.[21] Witnesses were asked to agree that anti-Semitism was worse in Russia that it had ever been in Nazi Germany (Hg. 12, 58, 89, 1101, 1015); that the Communist Party in the United States is a conspiracy (Hg. 1561); that Supreme Court decisions on the Communist Party are factually correct (Hg. 5781); and that the Committee's work is desirable (Hg. 15, 42, 61, 92, 1032-1033). Thus, when a witness stated that the Committee investigation "in spite of all fairness and good will . . . is not the way to get a clear picture of the extent of the Communist movement in the United States," the Committee Chairman said he was inclined to agree with the condemnation by another Committee member that "you haven't entirely disassociated yourself from the Communist ideology" (Hg. 5835-5836).

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[20] At the outset of the investigation the Committee indicated that its concern extended further than actual Party membership, to teachers "who are subject to the directives and discipline of the Communist Party" (R. 79), and also its interest in clearing those individuals "whose testimony admitting former Communist Party membership has that character of trustworthiness which convinces one that he has completely and finally terminated his Communist Party membership, and has been given in all good faith" (R. 78-79). As to the clearance function, see Hearings, 241-2, 251, 262, 998, 1129, 1135-6, 5803.

[21] Witnesses were particularly pressed to account for themselves if they had had the view prior to Russian entrance into World War II that the Nazi-Soviet Pact was only a temporary measure and that Russia was preparing to fight Germany (Hg. 1548, 1560; 1019-1020; 1047).

Witnesses were asked to prove themselves by writings, speeches, viewpoints, and organizational activity that would show their intellectual redemption. Witness Davis offered for this purpose his book review of a book on "Soviet Psychiatry" (Hg. 38); witness Boorstin emphasized, in answer to "how you have expressed your opposition" to the Party, his participation in religious activities (Hg. 51). (See also Hg. 111-112.)[22]

(3) *Compulsion to Name Others*

A crucial phase of this investigation into discussion and expression of lawful political opinion was the interrogation of the witness about his associates in such discussion and expression. The witness' willingness to give their names seems to have been considered a test of his intellectual redemption from Communist influence.[23]

To understand the dilemma of the witnesses it must be realized that they were in an unique situation, resulting from the Committee's assertion of the power to compel testimony in the area of belief and opinion, rather than in

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[22] A sidelight was thrown on the question of clearance by the problem of Felix Browder, son of Earl Browder, one-time leader of the American Communist Party. After one professor from Massachusetts Institute of Technology had been asked why Earl Browder's son had been awarded scholarships at MIT and he had been unable to give much information (Hg. 1027), a more articulate witness from the MIT faculty volunteered that Felix Browder was considered the most brilliant mathematics student in MIT's history; and though he was entirely disinterested in politics he had had great difficulty because of his name (Hg. 1090-1094). In answer to the Chairman's suggestion that the Committee would be glad to receive young Browder's proof of his anti-Communist work, the witness replied that this would be unavailable because he works only in the field of mathematics (Hg. 1092).

[23] See especially Hg. 5836, 5780. Compare articulation of this view by Senator McCarran, Chairman of Senate Subcommittee conducting similar investigations to the instant one: Brown, *Loyalty and Security* (1958), p. 411.

the area of unlawful acts or their incitement. For the witness was directed to expose past associates and friends though neither he nor the Committee had any indication they had ever been involved in unlawful or dangerous conduct. The Committee at no time indicated, either when there were refusals to answer or otherwise, that it had any factual basis, with respect to the individuals it was attempting to expose, for believing they had ever participated in unlawful activity or could contribute one iota of information on it. Thus, from the customary American standpoint that mere expression of peaceful political opinions is immune from Government intrusion and that a citizen's duty to inform on his fellow-citizens relates only to illegal or dangerous conduct, there was no apparent advantage to the public in the witness' injuring his past associates by damaging exposures of them. The only apparent purpose in his harming past associates—associates whom he had regarded as fellow-idealists—was to test his "cooperation" with the Committee and his own intellectual redemption.

This was the sticking-point, the final test—give names.[24] There was no escape, no matter how arduously the witness attempted to demonstrate, without refutation by the Committee, that the demanded exposure would be pointless. Thus, a witness who had testified fully about his own participation in discussion and political persuasion in the Communist Party group at Harvard, though he had not in fact been a Communist Party member (Hg. 1540), explained his resistance to re-exposing the 9 or 10 persons who had been in that group:

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[24] For this test, the Committee asked witnesses over and over about their knowledge of the same half-dozen or so persons who had already been named as members of the group to which the witness belonged. See Hearings, 7-8, 35-37, 103-104, 1016-1018, 1077, 1548-52, 1566-1570.

"I am prepared to talk about myself, but I honestly feel that in honor and conscience I cannot, I prefer not, I should not talk about my colleagues and associates. I know that you have had before you a number of people and they have spoken freely and I have thought very carefully about this because it is a most difficult position. . . . I feel strongly and knowing these people that they were like myself, they did nothing subversive. . . . (Hearing of May 26, 1953, pp. 1544-5).

"I am prepared to speak fully about myself, as I did yesterday, and tell you everything about myself, waiving my right to my own opinions, past or present, in honesty and sincerely; but I could never, sir, in honor and conscience, trade someone's career for my own, come what may . . . I will state emphatically if ever I encounter subversion among anyone, irrespective of whether they are my colleagues, I will gladly report it. It's my duty, I feel, to report it, but we were not subversive, sir. We didn't follow any slavist policy. We were intellectuals. We were scholars. We were pursuing a right, as we thought it . . . I have tried to project myself back into a world which was different than it is now. I have completely disassociated myself from those activities, and I have expressed that. I have no interest in those activities at all, but as I look back on them I give you my honest evaluation . . . I just feel I could not possibly work in my laboratory again. It's not that I'm hiding something. . . . It's a basic feeling . . . I checked up in the interim on my feeling, basic feeling, sir, about the questions you asked me: and that's what I think I devoted most of my time. The rest of the time I tried to rest . . . My conscience demands that anyone I know of who is subversive or has been subversive should be reported . . . But this was not subversion. I participated in this sir. I analyzed

it. It just wasn't. It wasn't a conspiracy." Hearing of May 27, pp. 1552-3, 1556, 1561. And see Hg. 1562.[25]

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[25] For indications by the Committee that it had no basis for believing the persons whose names it demanded had engaged in unlawful activity, see especially Hearings, 1553-1556. Compare Hg. 1579; 3571-2.

Other witnesses who refused to give names also made it clear that they would not have been reluctant to name anyone of whom there was reason to suspect involvement in unlawful activity (e.g., Hg 991, 4016-4017).

The witness quoted in the text was cited and convicted for contempt for his refusal to re-name the Harvard group. The conviction was finally reversed on the basis of this Court's *Watkins* decision. *Singer* v. *United States*, 247 F. 2d 535 (C. A. D. C.), vacating 244 F. 2d 349 and reversing 139 Fed. Supp. 847. Professor Arguimbau, who also testified about his own conduct but refused to give names (Hg. 4013-4036), was also convicted of contempt (Brown, *Loyalty and Security* (1958) p. 127 note 11); and a contempt indictment against Bernhard Deutch, who took the same position (Hg. 4043-4051), apparently is still pending (See 235 F. 2d 853, C. A. D. C.) The only way that appeared open to a witness to avoid naming names and at the same time avoid contempt proceedings for a refusal to answer, was to refuse to answer questions about his own involvement, on grounds of the Fifth Amendment privilege against self-incrimination; that is, it was thought that once the witness testified about himself, he had no legal protection against naming others. See Pollitt, *Pleading the Fifth Amendment*, 32 (1956) Notre Dame Lawyer 43. In this dilemma, witnesses refused to give testimony about themselves they might otherwise have been willing to give. (See Hearings, 1037, 1517, 4039-4040, 5757-5759, 5779-5780.) Invocation of the Fifth Amendment, however, resulted in suspicion and threatened or actual loss of employment. (Hg. 1582; see New York Times of July 2 and 3, 1954 as to discharge of witness Polumbaum, and Hg. 997; Brown, *Loyalty and Security* (1958) 127.)

Several of the contempt cases now pending in the lower Federal courts in which the witness refused to answer questions on grounds of the First Amendment, actually are based on a refusal to name others. For example in *United States* v. *Whitman*, D. D. C., Crim. No. 1213-56, Whitman, a copy reader on the *New York Times*, was called to testify, along with a number of *Times* employees, by the Internal Security subcommittee of the Senate Judiciary Committee in its investigation of newspapermen. He asserted that he had only been involved in lawful expression of opinion and that the whole interrogation violated the First Amendment. Nevertheless he would voluntarily answer all questions

Again it is to be emphasized that this type of probing into associations occurred solely because of the Committee's area of investigation: political belief and lawful expression of political opinion.

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The interrogation of the group of witnesses named by the witness Crowley, which included petitioner, dealt, like the rest of the investigation, wholly with political belief, discussion, and lawful persuasion. However, it diverged slightly from the predominating pattern because Crowley had been an undergraduate student when he had been a member of the Communist Party (Hg. 5761-5762). At the University of Michigan, where he knew petitioner, he first belonged to an undergraduate Communist group of 10 or 15 students (Hg. 5773-5774)—out of a total undergraduate enrollment of some thousands.[26] The activities of this group were to arrange meetings open to the whole student body for the discussion of current events (Hg. 5764); to write letters to the student newspaper on current issues (Hg. 5770); to circulate petitions on the campus (Hg. 5774).[27] The Haldane Club, which Crowley then joined and in which he allegedly knew petitioner, was not primarily for under-

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except those which would cause him to expose and injure past associates, whose activity he believed was like his own and whom he therefore had no reason to suspect of any involvement in illegality. He thereupon answered all questions except for naming others. The District Court has reserved decision in his case, pending this Court's determination of the instant case.

[26] *Supra*, p. 8.

[27] A minor number of witnesses besides Crowley and the Crowley-named witnesses were interrogated about such student, rather than professorial groups. See Hg. 225, 236, 989, 1001-1002, 1041, 1846-1859, 4044-4050. The interrogation of Crowley and his group, like that of the professorial group, also included questioning about off-campus activity in the field of political persuasion, such as electioneering for third-party candidates (Hg. 5757, 5760), and opposition to proposed legislation (5794).

graduates, and it concentrated on theoretical discussion rather than political persuasion (*supra*, pp. 7-8).

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In sum, the articulated purpose of the investigation was to examine into the intellectual influence of Communist Party members in colleges and universities, and the interrogations were directed at thought and the exchange and expression of opinion, either on abstract questions of political philosophy and economics or on the current issues of the day. The investigation was not directed at incitement or instigation of unlawful action to change our form of government nor did the information on which witnesses were summoned nor their interrogation involve this issue. Indeed, even as philosophical abstractions, force and violence were not a focus of thought or discussion in the groups to which the witnesses belonged (Hg. 58, 1025, 1051, 1059, 1543-1544, 3573-4, 4029-30, 4045, 4050, 5819).

2. *Effect of the Investigation on First Amendment Freedoms*

It is almost an anti-climax to analyze how the summoning and interrogation of petitioner and the investigation of which it was a part restrained First Amendment freedoms. He who runs through any part of this hearing can read on every page the contradiction of First Amendment principles.

a. Inhibition of All Non-Conformist Expression

Perhaps the most drastic restraint imposed on First Amendment freedoms by this investigation into peaceful political expression and association,[28] is indicated in this

[28] It may be noted that the same restraints ensue from any Congressional investigation in this area; they are not unique to investigations conducted by this Committee. See Dembitz, *Congressional Investigations of Newspapermen, Authors, and Others in the Opinion Field*, 40 (1956) Minnesota Law Review 517.

Court's *Watkins* opinion. Not only is compulsion exerted upon the witness to keep himself free from suspicion by adherence to the Committee's standards of acceptable opinions and associations, but "there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time"—that is, the fate of accounting for unpopular views "in the glare of publicity . . . subject to public stigma, scorn and obloquy." 354 U. S., at pp. 197-198. See also *Sweezy*, 354 U. S., at page 248, as to such an investigation's "inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly." The fact that one can easily be mistakenly accused, when accusation depends on someone else's estimate of his political convictions, heightens the intimidating effect of such an investigation on the expression of political views (Compare identification of a mathematics professor as a Communist Party member, Hg. 1572, with modification of this testimony, Hg. 1584).[29] This danger is compounded by the circumstances that "Proving after so long a time that one did not have certain beliefs is a most difficult thing to do" (Hg. 1582).

It hardly needs saying that the expression restrained by the Committee—the expression of political dissent—is the most essential aspect of First Amendment freedom. *Stromberg* v. *California*, 283 U. S. 359, 369; *Sweezy*, at pp. 250-251. And, as this Court has asserted, abstract discussion of any doctrine, including "Marxism-Leninism," must be protected. (*Dennis* v. *United States*, 341 U. S. 494, 501-2); one cannot seek knowledge if the mind can go only so far, and no farther. "Advocacy which is in no way brigaded with action should always be protected by the First Amend-

[29] As to the difficulty of disproving a false accusation, see Dembitz, op. cit. *supra*, 40 Minn. Law Rev. at pp. 531-532.

ment. That protection should extend even to the ideas we despise." *Speiser* v. *Randall*, 2 L ed 2d 1460, 1479 (concurrence). Here, however, change in our form of government, even as an abstract doctrine, was involved only to the slightest degree in the investigation. In the process of political interrogation, exposure, and evaluation, the Committee implicitly, if not explicitly, put a Government stamp of disapproval on all non-conformist thought and expression; it was this expression—quantitatively and qualitatively of much greater significance in this country than discussions of the philosophy of revolution—on which the Committee's work had its major restraining effect.

Perhaps of even greater importance under the First Amendment than the right of the general public to non-conformist political expression, is protection of freedom of thought and discussion by and among the faculty members of our universities—those whose vocation it is to think freely and boldly. "If we would guide by the light of reason, we must let our minds be bold." *New State Ice Company* v. *Leibmann*, 285 U. S. 262, 311, Brandeis, J. dissenting. Here the Committee took thought and expression in the academic world under governmental surveillance. "The essentiality of freedom in the community of American universities is almost self-evident." *Sweezy*, 354 U. S. at p. 250.

b. Interference with Freedom of Association and Conscience

Particular attention must be paid to the restraint imposed on freedom of association—that necessary adjunct to freedom of expression. Here the Committee hammered hard. In that the Committee forced disclosure, for the most part, of past association for the expression of political opinion, in a sense an even greater restraint was cast on freedom of association than by enforced disclosure of present group membership (Compare *National Association*

for Advancement of Colored People v. *Alabama*, 2 L ed 2d 1488, 1500). By compelling that associations be "disclosed and judged by current standards rather than those contemporary with the matters exposed" (*Watkins*, at p. 197), the Committee promotes fear of all association for the expression of non-conformist views, for any may at some time in the future appear suspicious. Such an investigation is "bound to operate as a real deterrent to people contemplating even innocent associations." See *Garner* v. *Los Angeles Board*, 341 U. S. 716, 727-8, Frankfurter, J. concurring in part. See also *Wieman* v. *Updegraff*, 344 U. S. 183, 191. The Committee undermines the self-confidence and mutual confidence without which men cannot associate to exchange and express political views. It deters association not only because of fear of being exposed and judged in the indefinite future, but also, we suggest, because of reluctance to undergo the moral dilemma of compulsion to participate in such an exposure of others.

Besides interfering with freedom of association, we submit that the Committee's insistence on the naming of names, without any indication that the persons to be named had engaged in illegality, also interfered with the freedom of thought protected by the First Amendment. Through this insistence, backed by the contempt power, the Committee tried to coerce acceptance of a new standard of right conduct—that one should win one's own exculpation and salvation by shifting suspicion and stigma to his fellows, though neither he nor the interrogating official has reason to think they have done wrong. The Committee thus tended to impose a standard, through the power of government, contrary to widely and deeply held ethical belief; it was thus intruding in the domain of conscience, which "it is the purpose of the First Amendment to our Constitution to reserve from all official control."[30]

[30] *Board of Education* v. *Barnette*, 319 U. S. 624, 642.

c. Conflict between the Committee's Basic Purpose and the First Amendment

How the Committee came to perform the non-governmental function of imposing standards of acceptable belief and expression, can be understood when it is realized that the basic purpose and premise of the interrogation of petitioner and of the entire investigation were directly contrary to First Amendment principles. For, the Committee's articulate premise was that an influence upon the thinking of private citizens which is regarded as undesirable is the proper concern of Congress and should be eliminated through the work of the Committee (*supra*, pp. 5-6 and R. 7[illegible]—indeed, it should be eliminated no matter how minimal it may be in comparison with other influences. Thus, in the course of the investigation the Committee recognized that it was only an infinitesmal percentage of teachers who even might have, because of Communist connection, tried to influence student thought in an undesirable manner (R. 243; Hg. 1143). It applied to the field of ideas, however, the adage more applicable to horticulture that "one rotten apple spoils the barrel" (Hg. 1060, 1934).

Thus the Committee demonstrated no conception of the First Amendment fundamental: "It is not the function of our Government to keep the citizen from falling into error."[31] The Committee's purpose and work were diametrically opposed to "the theory of our Constitution . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market"[32] and "the traditional right of Americans to discuss and evaluate ideas without fear of governmental sanction."[33] Rather

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[31] *American Communications Association* v. *Douds*, 339 U. S. 382, 442 (Jackson, J., concurring in part).

[32] *Abrams* v. *United States*, 250 U. S. 616, 630 (Holmes, J., dissenting).

[33] *Dennis* v. *United States*, 341 U. S. 494, 502.

than confidence in the distillation of truth from diversity of viewpoint, the Committee assumes exposure to error is so likely to preclude the discovery of truth that it should not be permitted; not diversity but conformity is the precept of the investigation. The Committee will not risk the "competition of the market" in the field of ideas without government manipulation of it.

d. Interference with Right to Participate in Medium of Expression

A fundamental corollary of these First Amendment postulates, likewise ignored by the Committee, is this: the Government cannot interfere with speech on the basis of the character or associations of the speaker but can only be concerned with whether "utterances transcend the bounds of the freedom of speech which the Constitution protects."[34] Except for such utterances, Government cannot interfere with a speaker's First Amendment right to "reach the minds of willing listeners."[35] The Committee squarely violated this principle when it attempted to degrade teachers and eliminate them from their profession on the basis of their alleged beliefs and associations, in order to curtail their opportunities to express their views. "[T]he power of reason as applied through public discussion"[36] cannot prevail under the Committee's revision of the First Amendment—if the government suppresses speech on the basis of who

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[34] See *De Jonge* v. *Oregon*, 299 U. S. 353, 365: "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." The same: *Herndon* v. *Lowry*, 301 U. S. 242, 258-259.

[35] See *Kovacs* v. *Cooper*, 336 U. S. 79, 87 (opinion of Reed, J.).

[36] *Whitney* v. *California*, 274 U. S. 357, 375 (Brandeis, J., concurring).

is speaking, labels speakers as acceptable or unacceptable, and establishes that ideas are to be prejudged on the basis of who enunciates them.

Besides destroying the free debate of ideas, the Committee cast a direct restraint on the First Amendment right of the affected individuals to participate in opinion-expressing vocations and media—a right with which government can interfere only insofar as their "utterances transcend" constitutional limits. Here the effort was to purge the ranks of University professors; in other investigations it has been the press and the church.[37] The danger of a humiliating experience and a damaging exposure at the hands of the Committee, inhibits individuals who are vulnerable to attack from participation in a medium likely to come under Committee surveillance.[38] Moreover, even if the teachers, writers, and other individuals are themselves willing to take this risk, the Committee's exposures, with its embarrassment of the employer and the employing institution as well as the individuals themselves, may mean and in fact has often meant that they are unable to retain or secure employment in their chosen vocation or medium.[39] "That

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[37] Dembitz, op. cit. *supra*, 40 Minn. Law Rev. at pp. 517-518, 552.

[38] That is, the restraint is comparable to that in *Rumely* v. *United States*, 197 F. 2d 166, 174 (C. A. D. C.), aff'd 345 U. S. 41. There an investigating committee's exposure of the names of purchasers of an organization's literature was held to restrain individuals from participating in the organization's affairs as purchasers; here the threat of exposure leveled at teachers and others in opinion-disseminating positions restrains participation in media of expression.

[39] See *supra* note 25, as to discharge of witness Polumbaum; Brown, *Loyalty and Security* (1958) p. 127 and ff., esp. p. 129; consider *supra* p. 5, as to termination of petitioner's employment at Vassar College; see New York Times for Jan. 6, 1956, respecting discharge by New York Daily News of a reporter who refused on First Amendment Grounds to answer questions in the Senate Internal Security Subcommittee's investigation of the press; see

this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction." *Watkins*, 354 U.S. at p. 198. The same: *National Association for the Advancement of Colored People*, 2 L ed 2d at 1500.[40]

The question here is not whether persons holding certain standards of scholarship or expressing certain viewpoints should or should not, in the opinion of educators or university authorities acting independently of the government hold faculty positions, or should or should not, in the opinion of private citizens acting on the basis of their own thinking and initiative, gather an audience. The question is what is the function of *Government*, under the Constitution, in relation to belief and expression, and whether an agency of government can interfere with opportunities for expression and the free exchange of opinion among private citizens on the basis of its view of their beliefs and associations. The government's interference with opportunities for expression was particularly noxious in the instant case because the Committee investigation bore directly on the academic world, where "the essentiality of freedom . . . is almost self-evident."[41]

Brief of American Association of University Professors, *amicus* in instant case, pp. 16-18.

The hearing of the appeal from the newspaper reporter's conviction for contempt has been deferred until after this Court's decision of the instant case (*Price* v. *United States*, No. 13,925, C. A. D. C.).

[40] See also in support of this principle, *Railway Employees' Dept.* v. *Hanson*, 351 U. S. 225, 232; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 141; *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462.

[41] *Sweezy*, 354 U. S. at p. 250. And see *Sweezy* at p. 262 (Frankfurter, *J.*, concurring): "'[T]he exclusion of governmental intervention in the intellectual life of a university' is essential to a free society.

(*Continued on next page*)

B. The Committee's Interference with First Amendment Rights Was Not Justified by a Legislative Purpose

1. *Impossibility of Justifying Investigation in Area of Belief*

Before taking up the question of purposes which might have afforded justification for the investigation, we suggest that it may be unnecessary to reach that problem in this case; that is, here the unconstitutionality of the investigation is clear without considering the doctrine that the invasion of First Amendment rights must be weighed against the justification therefor. For, the witness at the time, and the Court thereafter, can only determine the validity of the interrogation and the witness' duty to answer in the light of its then purpose, rather than some "retroactive rationalization."[42] Here the Committee's announced and reiterated purpose was to investigate matters of thought and belief, and association affecting them, of private citizens. We believe this purpose, without more, establishes the invalidity of the investigation. By definition, influences on thought are so far removed from action with which the Government can legitimately be concerned, that there could be no justification for an investigation in this area. "[T]he domains of con-

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The problem here is of course an entirely different one from that before the Court in *Beilan* v. *Board of Public Education*, 2 L ed 2d 1414. There under consideration was the function of a municipal board of education, which necessarily enters affirmatively into the educational process because it establishes and operates the public schools; the question was whether, as a municipal employer, it had accorded due process in determining the fitness of a teacher.

[42] *Watkins*, 354 U. S. at p. 204. See also pp. 206, 208-209, 214-215. And see *United States* v. *Icardi*, 140 F. Supp. 383, 388 (D., D. C.): "The Court does hold that if the committee is not pursuing a *bona fide* legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal', even though that very testimony be relevant to a matter which could be the subject of a valid legislative investigation."

science and belief have been set aside and protected from government intrusion."[43]

2. *Committee's Sole Purpose to Expose*

In the event it is nonetheless deemed necessary to consider possible justifications for the instant invasion of rights, we believe it clear that the entire investigation, or at the very least the interrogation of petitioner and the section of the investigation of which it was a part, had as its sole purpose "to expose for the sake of exposure," and that it therefore did not serve a permissible legislative purpose. *Watkins*, at p. 200.

The Committee stated in its 1954 Annual Report that the sessions at which petitioner was called "were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success" (R. 262). Judging from this statement, the Committee had not regarded the interrogation of petitioner as connected, even remotely, with the purported subject of "infiltration of education," but had instead regarded it as part of a more general exposure effort. But assuming the Committee summoned petitioner because of his connection with education, the announced purpose at the inception of the education hearings was to deal with "infiltration of education" by exposing members of the teaching profession who were connected with the Communist Party, in the hope that they would be eliminated from the profession (R. 77; compare R. 265-266).

Thus the Committee's purpose in summoning petitioner was either an exposure of individuals at random, or of

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[43] *Speiser* v. *Randall*, 2 L ed 2d 1460, 1479 (concurrence); also *Board of Education* v. *Barnette*, *supra* note 30.

individuals in teaching. Its actual procedure in the session in which petitioner was called indicates the former. The basis for the session was the circumstance that one Crowley, who had previously refused to testify, was now ready to testify as to his own past Communist membership and to name those with whom he had associated (Hg. 5753-4). Following Crowley's appearance on the stand, persons named by him were called.[44] They as well as Crowley himself were questioned indiscriminately about the period since they knew Crowley as well as when they knew him, and about any opinion, association, or activity in the field of political persuasion which could be suspect, for the most part unconnected with educational institutions (See Hg. 5756-5761, 5785-5790, 5793-5795, 5798-5801, 5821, 5832, 5834). Such an indiscriminate questioning of witnesses cannot be said to serve any purpose other than that which the Committee indicated: to expose and pillory whoever and whatever came to hand.

3. *Relation of Investigation to Efforts to Overthrow the Government*

Let us assume *arguendo* that the summoning of petitioner and the investigation of education in which his interrogation was physically included, should be viewed in the light of legislative purposes that the Committee might have had. The court below indicated that, as urged in the *Watkins* case, the ultimate alleged justification for the investigation might be Congressional concern with "efforts to overthrow the government by force and violence" (*Watkins*, 354 U. S. at p. 204; R. 284). But

> "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The

[44] See Hg. 5768, 5772, 5773, 5777-5778, for Crowley's naming of witnesses who succeeded him.

critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly . . . [T]he courts . . . (must) strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference." *Watkins*, at pp. 198-199, 205-206.

And the countervailing interest of the State must be strong and compelling to justify an infringement of First Amendment rights, considering their importance to the democratic structure. *Sweezy*, 354 U. S. at p. 251, at p. 265 (concurrence); *National Association*, 2 L. ed 2d at p. 1500.

In determining whether there was any "public need" for the instant investigation and interrogation of petitioner from the standpoint of efforts to overthrow the government, the salient consideration is the obvious "remoteness of subject" (*Watkins*, at p. 204) between the subject of the investigation on the one hand, and, on the other, efforts to overthrow the government or expression so proximate to such efforts that it is within the legislative sphere.[45] As we have already emphasized, the Committee avowed at the outset of the investigation and in its course, prior to the summoning of petitioner, that it was directed at influences on thought; and the interrogation of the leading witnesses

[45] See note 7.

further confirmed that the focus of the investigation was belief, association affecting belief, and the reflection of belief in abstract discussion or peaceful political persuasion. (*Supra* pp. 30-32.) Thus, the Committee was fully aware of the distinction between the two spheres of Communist activity, repeatedly recognized in the decisions of this Court:[46] the sphere of discussion and normal political activity on the one hand, and the sphere of incitement of action to overthrow the government on the other. The Committee's statements and its interrogation of leading as well as succeeding witnesses indicate that it at no time thought it likely or had reason to believe that the instant investigation in the former sphere would produce information in the latter—that is, as to efforts or incitement of action to overthrow the government[47]—nor was any such information in fact produced (*supra*, pp. 32-42).

As to petitioner himself, the basis for summoning him was his alleged membership in a group, the Haldane Club, engaged in discussion of Marxism, particularly in relation to the arts (*supra*, pp. 7-8); there was no information that overthrow of the government was discussed in the group even as an abstract theory, and *a fortiori*, no indication of any advocacy of action to overthrow the government.

Certainly abstract discussion of Marxist theories and peaceful political persuasion on issues of the day are a number of "removes"[48] from that expression relating to

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[46] See *Nowak* v. *United States*, 356 U. S. 660, 666-667; *Rowoldt* v. *Perfetto*, 355 U. S. 115, 117-118, 120; *Yates* v. *United States*, 354 U. S. 298, 330-331; *Dennis* v. *United States*, 341 U. S. 494, 516; *Schneiderman* v. *United States*, 320 U. S. 118, 155-157.

[47] The Committee was aware beforehand of the testimony that could be adduced at the public hearings, by virtue both of the Committee investigator's interviews with the witnesses and preliminary hearings in executive session.

[48] See *Yates* v. *United States*, 354 U. S. 298, 324.

overthrow of the government which may be within Congress' legislative and therefore its investigative sphere.[49] For, expression must be free from government control unless it constitutes a clear and present danger of evil action; Congress cannot legislate against expression unless, at the least, it is advocacy and incitement of concrete action to overthrow the government.[50] Even if these limits of Congressional power over advocacy be viewed most liberally, the expression of opinion here involved and *a fortiori* the thoughts and beliefs here under investigation are extremely remote from such advocacy and thus from a subject of legitimate Congressional concern under the Constitution.

In sum, the connection between the subject of this investigation and the interrogation of petitioner on the basis of his alleged membership in the Haldane Club, on the one hand, and incitement of any action to overthrow the government on the other, was highly remote, speculative, and shadowy;[51] the investigation cannot be said to have a "substantial bearing" on the matter of posited legislative concern. See *National Association*, 2 L. ed 2d at p. 1501. Such a mere tangential connection with an evil within the legislative province certainly cannot justify an investigation which, like the instant one, seriously interferes with First Amendment rights. Even if such a connection might suffice

[49] The power to investigate does not "extend to an area in which Congress is forbidden to legislate . . ." *Quinn* v. *United States*, 349 U. S. 155, 161.

[50] See *supra* note 7.

[51] See *Watkins* at p. 204; *Sweezy*, at pp. 251-254; at p. 265 (Frankfurter, *J.*, concurring; Harlan, *J.*, joining). In the language of the older cases, the investigation was merely a "fishing expedition" from the standpoint of obtaining information on incitement of concrete action to overthrow the government. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445 (opinion by Holmes, *J.*); *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 26; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305-306.

in other situations, "when weighed against the grave harm resulting from [this] governmental intrusion" in the field of freedom of belief and expression, the alleged justification "appears grossly inadequate." *Sweezy*, at p. 261 (concurrence). More must be shown to justify this investigation than the highly remote connection—which is the most the government can show—between it and efforts to overthrow the government. To justify an invasion of these vital rights, the "'subordinating interest of the State must be compelling.'" *National Association*, 2 L ed 2d at p. 1500.

4. *Relation of Investigation to Veterans' Benefits and Research Grants*

In the first opinion of the court below, it was suggested that Congress had a concern with "the Veterans' Readjustment Assistance Act . . . which provides that educational stipends shall not be paid to veterans in attendance at educational institutions listed by the Attorney General as totalitarian, fascist, communist or subversive" (R. 282). Again it must be observed that the investigation was not in fact directed at gathering information relative to the subject suggested by the Court of Appeals as a justification (*supra*, p. 50). Justification for an investigation must be found in the purpose for which witnesses are summoned and their privacy violated, rather than in the fact that perchance some thought on another subject may occur to the Committee as a result of the investigation.[52] Thus, this investigation cannot be justified in terms of legislative concern with the treatment of veterans.

Passing this point, however, the veterans' legislation cannot be interpreted to mean that there should be discrimination against attendance at an established institution of higher learning because of the presence on the campus

[52] See *supra* note 42.

of Marxist discussion groups or because of the political beliefs and associations of faculty members. This legislation does not therefore show or justify Congressional concern with the beliefs or associations which were here under investigation. Congress cannot be thought to have intended the Attorney General to conduct inquiries into intellectual influences at *bona fide* educational institutions, and to have the power to stigmatize our great institutions of learning as "subversive" on the basis of such an inquiry. Nor could Congress under the First Amendment consider legislation providing for such authority. The government cannot in the grant of privileges "impose conditions which require the relinquishment of constitutional rights;"[53] it cannot, by conditioning its benefits, coerce and restrain thought and expression within the protection of the First Amendment.

As this Court said only recently with respect to the denial of a benefit:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas'" *Speiser* v. *Randall*, 2 L ed 2d 1460, 1468.

At the most, although we are unwilling to make any concession in this respect, Congress might have a legitimate concern, from the standpoint of granting special benefits

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[53] *Frost* v. *Railroad Commission*, 271 U. S. 583, 594. As to the constitutional right to freedom from Government restraint in the area of belief, expression and association here in issue, see *supra* pp. 50, 52-56.

for educational purposes, with whether an institution was of a general educational nature as distinguished from one which concentrated on the teaching of certain doctrines or certain philosophical or ideological material. Certainly, both as a matter of due process and First Amendment right, the Government could not stigmatize an institution or discriminate against it on any lesser basis than the predominating nature of its curriculum and instruction.

Assuming, purely *arguendo*, a legitimate legislative concern with the predominant nature of the curriculum and instruction at educational institutions, the instant investigation into the political beliefs and associations of teachers, and of petitioner in particular for the period of his teaching fellowship at the University of Michigan, would have minimal, if any, relation to this legislative concern, and the infringements of First Amendment freedom involved in the interrogation of petitioner could not be justified on this basis.[54]

As to the other justification for the investigation suggested by the court below in its first opinion—that Congress has a concern with grants for "secret defense projects" in the universities (R. 282)—here again we must point out that the Committee stated that its purpose was to investigate influences on thought; Congressional concern with secret defense projects, like the other possible justifications for the investigation considered by the Court of Appeals, must be deemed a "retroactive rationalization". (*Watkins* at p. 204). Furthermore, here the connection between the

[54] Assuming *arguendo* the legitimacy of this legislative concern, there would at the least have to be some facts with respect to the content of the teaching at the institution indicative of the danger that it might be predominantly "Communist," before a committee could invade First Amendment rights by an investigation like the instant one of individual belief and expression. Compare *Rumely* v. *United States*, 197 F. 2d 166, 172 (C. A. D. C.) aff'd 345 U. S. 41; cases cited *supra* note 51; see Dembitz, op. cit. *supra*, 40 Minn. Law Rev. at pp. 546-551.

questioning of petitioner and the suggested subject seems not only remote but fanciful. To question petitioner, a teaching fellow in social psychology with no connection with secret defense projects or even with the fields in which they were being undertaken, who was alleged to belong to a group discussing Marxism and the arts, in order to get information about any such projects would seem to deserve the label not only of a fishing expedition but perhaps a wild goose chase.

We do not think the Court of Appeals would have offered these insubstantial after-the-fact justifications for the investigation if it had reviewed the situation in the light of the grave effect of the investigation on First Amendment rights, and of the doctrine enunciated definitively after its decision in this Court's *Watkins, Sweezy,* and *National Association* opinions, that an investigation intruding on First Amendment rights cannot be justified by a mere remote and speculative connection with a subject of legitimate concern.[55]

* * * * *

We may close this discussion of the unconstitutionality under the First Amendment of the instant investigation and interrogation of petitioner by paraphrasing the recent unanimous opinion of this Court in the *National Association* case. There was not here the "compelling" interest of the State which is constitutionally required to justify an investigation restraining the exercise of First Amendment rights: there was here no "interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect" of the investigation on the "Constitutionally pro-

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[55] Further, as to both the veterans' and the research grants, Congress could not, by virtue of actual or possible grants of benefits engage in an investigation infringing on First Amendment rights which would otherwise be beyond its power. See *Butler* v. *United States,* 297 U. S. 1, 68-71.

tected right of association," belief and expression. 2 L ed 2d at p. 1500. The legislature cannot investigate, any more than it can legislate, by blunderbuss methods when First Amendment rights are involved. The investigation here did not represent "the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society."[56]

Whatever other authority the Committee may have, it did not, because constitutionally it could not, have authority to conduct the instant investigation and interrogation of petitioner.

IV.

Petitioner's conviction must be reversed because the Committee did not clarify for him either the subject of the investigation or the pertinence thereto of the interrogation.

Petitioner, refusing to answer the questions recited in the indictment as to his and Crowley's membership in the Communist Party, as well as his membership in the Haldane Club and the Council of Arts, Sciences and Professions, objected to the questions on the general ground that an inquiry into his private beliefs and associations was unconstitutional, and noted, among other cases, this Court's opinion in the *Jones* case (R. 227-235, esp. 229). Like the latter point, petitioner's general objection was in essence, an "objection by the witness on grounds of pertinency" (See *Watkins* at p. 214), for petitioner's contention here was

[56] *Burstyn* v. *Wilson*, 343 U. S. 495, 504. See also *Donaldson* v. *Read*, 333 U. S. 178, 184; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116; *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Schneider* v. *State*, 308 U. S. 147, 161.

that he did not see any justification for his interrogation from the standpoint of any danger or any valid subject for investigation, particularly since he was not a government employee. In response to petitioner's objections, the only explanation indicated by the Committee was that the interrogation would give petitioner an opportunity to "clean up" and relieve himself of embarrassment suffered as a result of Crowley's naming him (R. 221).

Despite the Committee's failure to explain the subject of the investigation or pertinence to petitioner, the Court below held the Committee had in part acquitted itself of its duty of clarification under *Watkins* by virtue of counsel's statement at the opening of the hearing on the day petitioner testified (R. 298). We doubt that the clarification required by the *Watkins* decision can rest on mere assumption of the witness' presence at the proceedings during the period preceding his interrogation. In any event, assuming petitioner's presence from the opening of that day's hearing, we dispute the Court of Appeals' conclusion that it would thereby have been clear to petitioner that the subject of the hearing was "Communist Party activities in the field of education" (R. 302) and that the pertinency thereto of his interrogation would have likewise been clear.

Counsel's statement at the opening of the hearing was that the "field covered will be in the main communism in education and the experiences and background in the party by Francis X. T. Crowley. It will deal with activities in Michigan, Boston, and in some small degree, New York" (R. 298, 175). Emphasis by Committee counsel and members was on the latter point—that the purpose of the hearing was to permit Crowley "to come before the Committee and tell his entire story," apparently to exculpate himself because of a previous refusal to testify (R. 174-176, 180-182). If, as the Court below seemed to assume, a witness

has the burden of deducing the subject of the hearing by listening to the interrogation of other witnesses, the interrogation of Crowley and of the witnesses who followed him prior to petitioner also indicated that Crowley's experiences and exculpation rather than education was the subject of the hearing. The statement of the Court below that all the interrogation related to the University of Michigan (R. 298) is erroneous. Rather, Crowley and the other witnesses were to a greater extent questioned about political participation, employment, individuals and organizations that were totally removed from academic life (*supra*, p. 52).

The impression from the interrogations preceding petitioner's was of a dragnet operation, supplementary to clearing Crowley, in which the Committee called available persons of those Crowley had named, and questioned them indiscriminately with respect to any non-conformist political view or act, casting suspicion broadside on them, their employers, and their associations. Indeed, judging from the Committee's 1954 report, the Committee itself did not regard the summoning of petitioner and the session at which he testified as related to the field of education, but merely as an adjunct to hearing Crowley and as part of its general identification of alleged Communists (R. 262).

Thus, if the purpose of the session was, as most of the circumstances indicated, to give Crowley an opportunity to "tell his entire story,"[57] the pertinence of questioning petitioner was certainly unclear; and his objection that he was unable to discern the justification for summoning him most apt.

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[57] If this was in fact the purpose of the hearing, it obviously was outside the Committee's authority. Neither an aimless hearing for the purpose of eliciting whatever testimony happens to be within a particular individual's ken, nor a hearing for the purpose of having a witness "clear" himself, can be thought to serve a legislative purpose.

Furthermore, even if it had appeared with any clarity that the subject of the hearing was "communism in education," the alleged pertinence thereto of the questions asked of petitioner would have been unclear. For, the subject of "communism in education" would be commonly understood to refer to a teacher's reliance on Communist doctrine in his teaching. Certainly none of the witnesses were questioned about "communism in education" from this standpoint, nor was petitioner, though he had himself been teaching immediately prior to the hearing and during part of the period when he had been associated with Crowley.

Because the Committee did not clarify for petitioner either the subject of the hearing nor the pertinence thereto of the questions it asked him, he had no duty to answer (*Watkins* at pp. 214-215).

CONCLUSION

The judgment below should be reversed, and petitioner's conviction held invalid.

Respectfully submitted,

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